

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

April 29, 2003

IN RE:

COMPLAINT OF BEN LOMAND  
COMMUNICATIONS, INC. AGAINST  
CITIZENS COMMUNICATIONS COMPANY  
OF TENNESSEE, LLC D/B/A FRONTIER  
COMMUNICATIONS OF TENNESSEE

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DOCKET NO.  
02-01221

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ORDER CONVENING CONTESTED CASE  
AND APPOINTING A PRE-HEARING OFFICER

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This matter came before Chairman Sara Kyle, Director Deborah Taylor Tate and Director Pat Miller of the Tennessee Regulatory Authority (the "TRA" or "Authority"), the voting panel assigned to this Docket, at the regularly scheduled Authority Conferences held on January 27, 2003 and March 3, 2003 for consideration of the *Complaint* filed by Ben Lomand Communications, Inc. ("Ben Lomand") on November 12, 2002 against Citizens Communications Company of Tennessee, LLC d/b/a Frontier Communications of Tennessee ("Citizens").

**Background**

Citizens is an incumbent local exchange carrier serving Weakley, Putnam, and Cumberland counties as well as the cities of Sparta (located in White County) and McMinnville (located in Warren County). Citizens filed revisions to its General Customer Services Tariff ("*Tariff*") on April 11, 2002 introducing two new service offerings to business customers. The first offering is a Centrex-based service named Versaline. The second offering provides flat-rate business customers with discounts for committing to term plans in addition to other selected Citizens' offerings. Both offerings are limited to customers in the McMinnville and Sparta exchanges. The *Tariff* became

effective on May 12, 2002.

Ben Lomand is a competitive local exchange carrier and is a wholly-owned subsidiary of Ben Lomand Rural Telephone Cooperative. Ben Lomand is authorized to provide service in Warren and White counties including the cities of McMinnville and Sparta. Accordingly, Ben Lomand competes with Citizens in the McMinnville and Sparta exchanges.

Ben Lomand filed its *Complaint* on November 12, 2002 alleging that the *Tariff* unlawfully discriminates against Citizens' customers not located in the McMinnville and Sparta exchanges and is unduly preferential to Citizens' customers that are located within the McMinnville and Sparta exchanges in violation of Tenn. Code Ann. § 65-4-122.<sup>1</sup> The *Complaint* alleges that the offering of credits or discounts to customers who subscribe to the *Tariff*'s term plan for business flat-rate customers and who subscribe to other Citizens' offerings constitutes unjust discrimination, an undue and unreasonable preference, and unreasonable prejudice to customers who do not, or cannot, make such selections or subscriptions.<sup>2</sup>

Ben Lomand's *Complaint* also claims that customers of both Citizens and Ben Lomand are unreasonably prejudiced by the *Tariff*'s provisions which limit these offerings to the McMinnville and Sparta exchanges in violation of the policy set forth in Tennessee's Telecommunications Act.<sup>3</sup>

The *Complaint* alleges further that Citizens' new service offerings result in cross-subsidization, predatory pricing, and other anti-competitive practices including offering services below cost, all in violation of Tenn. Code Ann. § 65-5-208(c).<sup>4</sup>

The *Complaint* further characterizes the new service offerings contained in the *Tariff* as "special contracts in violation of Tennessee law."<sup>5</sup> The *Complaint* also alleges that the *Tariff* violates

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<sup>1</sup> *Complaint*, p. 3 (November 12, 2002).

<sup>2</sup> *Id.*, pp. 4-5 (November 12, 2002).

<sup>3</sup> See Tenn. Code Ann. § 65-4-123 (Supp. 2002) which sets forth the telecommunications services policy of Tennessee including the regulation of telecommunications services providers so as to protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications service provider.

<sup>4</sup> *Complaint*, p. 5 (November 12, 2002).

<sup>5</sup> *Complaint*, p. 6. (November 12, 2002).

Tenn. Code Ann. § 65-5-204(a)(1)-(2) which prohibits discriminatory pricing and unjust or unreasonable ratemaking classifications. In its *Complaint*, Ben Lomand asks the TRA to convene a contested case, investigate and terminate the *Tariff*'s offerings, impose sanctions for any violation of state law and award damages to Ben Lomand.

*Citizens Telecommunications Company of Tennessee's Motion to Dismiss the Complaint* ("Motion") was filed on December 4, 2002. Citizens argues in its *Motion* that the *Complaint* should be dismissed on procedural grounds because the *Complaint* was not timely filed at least seven days prior to the Authority Conference immediately preceding the *Tariff*'s effective date.<sup>6</sup> The *Tariff*'s proposed effective date was May 12, 2002; however, Ben Lomand did not file its *Complaint* until November 13, 2002. The *Motion* cites additional procedural grounds for dismissal, stating that Ben Lomand has not set forth with specificity the factual basis for its contention that the *Tariff* results in predatory pricing or is an illegal special contract.<sup>7</sup>

Citizens also argues in its *Motion* that the TRA has already determined that Citizens may offer incentives and promotions exclusively in the McMinnville and Sparta exchanges to meet competitive pressure prevalent in those exchanges.<sup>8</sup> In the *Motion*, Citizens cites the Authority's *Order Approving Promotional Tariff and Denying Complaint and Petition to Intervene* entered in Docket No. 02-00088 as an example of a tariff which was limited to the McMinnville and Sparta exchanges and which was approved by the Authority over objections similar to those raised in this Docket by Ben Lomand. Citizens also points to two unchallenged tariffs filed in Docket Nos. 00-00963 and 00-00965, as further examples of Authority-approved tariffs which contained offers limited to the McMinnville and Sparta exchanges.<sup>9</sup>

Citizens' *Motion* answers Ben Lomand's charge that the *Tariff* violates the requirements of

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<sup>6</sup> *Citizens Telecommunications Company of Tennessee's Motion to Dismiss the Complaint*, p. 5 (December 4, 2002). TRA Rule 1220-1-2-.02(4) requires complaints filed in opposition to tariffs to be filed "no later than seven (7) days prior to the Authority Conference immediately preceding the proposed effective date of the tariff."

<sup>7</sup> *Id.*, pp. 4-5.

<sup>8</sup> *Id.*, p. 6.

<sup>9</sup> *Id.*, p. 6.

Tenn. Code Ann. § 65-4-122 by stating that the competitive conditions found in McMinnville and Sparta are different than those found in Weakly, Putnam, and Cumberland Counties and that preferences to businesses in McMinnville and Sparta are therefore not undue or unreasonable.

Citizens' *Motion* also answers Ben Lomand's charges that the *Tariff* results in predatory pricing or other violations of Tenn. Code Ann. § 65-5-208(c) stating that the prices in the *Tariff* comply with that statute's price floor requirements. Citizens points out that it has filed cost support for the *Tariff* with the Authority and that there is no allegation in the *Complaint* that the prices in the *Tariff* are below the price floor.

Citizens' *Motion* concludes by addressing Ben Lomand's characterization of the *Tariff* as a special contract. Citizens states that the offerings at issue in this Docket are not special contracts because they do not provide rates, services and practices not covered by or permitted in the general tariffs.<sup>10</sup> Citizens also points out that the *Complaint* offers no citation to Tennessee law in support of the proposition that the *Tariff* constitutes a special contract.<sup>11</sup>

The *Response of Ben Lomand Communications, Inc. to Citizens Communications Company of Tennessee LLC, Frontier Communications of Tennessee's Motion to Dismiss* ("Response") was filed on December 19, 2002. In its *Response*, Ben Lomand argues that TRA Rule 1220-1-2-.02(4), cited by Citizens for the proposition that the *Complaint* was not timely filed, does not apply.<sup>12</sup> Ben Lomand argues that this rule applies to those who wish to challenge a tariff prior to its proposed effective date.<sup>13</sup> Ben Lomand points out that Citizens' interpretation of this rule would preclude any challenge to a tariff filed less than seven days before the Authority Conference preceding the tariff's proposed effective date or filed after the tariff becomes effective.<sup>14</sup> Ben Lomand argues that this rule does not preclude complaints alleging predatory and anti-competitive behavior and that TRA Rule

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<sup>10</sup> *Id.*, p. 8.

<sup>11</sup> *Id.*

<sup>12</sup> *Response to Motion to Dismiss*, pp. 2-3 (December 19, 2002).

<sup>13</sup> *Id.*, p. 2.

<sup>14</sup> *Id.*, p. 3.

1220-1-2.02(1) provides a basis for such complaints to go forward in that it allows the Authority to commence a contested case at any time regarding matters within its jurisdiction.<sup>15</sup>

The *Response* contends that the *Order Approving Promotional Tariff and Denying Complaint and Petition to Intervene* entered in Docket No. 02-00088 and the tariffs approved in Docket Nos. 00-000963 and 00-000965 do not constitute grounds to dismiss Ben Lomand's *Complaint* because the *Complaint* alleges anti-competitive practices in violation of several Tennessee statutes.<sup>16</sup> Ben Lomand argues in its *Response* that the existence of competition does not cure a violation of these statutes.<sup>17</sup>

Ben Lomand's *Response* reiterates Citizens' position that the *Tariff* violates Tenn. Code Ann. § 65-5-208(c) stating that, although the *Complaint* alleges no price floor violations, it results in cross-subsidization, price squeezing, predatory pricing, price discrimination, tying arrangements and/or other anti-competitive practices.<sup>18</sup> Ben Lomand concludes its *Response* by renewing its contention that the *Tariff* is a special contract in violation of Tennessee law.<sup>19</sup>

### **Findings**

As a preliminary matter the Authority finds that Authority Rules 1220-1-2-.02(b) and (c) do not preclude the filing of Ben Lomand's *Complaint*. The *Complaint* addresses, *inter alia*, the competitive impact of the *Tariff*. Citizens' interpretation of these rules would require the competitive impact of a tariff to be determined prior to its implementation. Therefore, Citizens' claim that the *Complaint* was not timely filed is denied. The Authority likewise finds as insufficient Citizens' assertion that the *Complaint* fails to plead a sufficient factual basis for alleging predatory pricing.

The Authority has addressed the issues raised by Ben Lomand (e.g. unjust price discrimination, undue or unreasonable preferences, unreasonable prejudice, and unjust or

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*, p. 4.

<sup>17</sup> *Id.*, p. 5.

<sup>18</sup> *Response to Motion to Dismiss*, pp. 5-6 (December 19, 2002).

<sup>19</sup> *Id.*, p. 6.

unreasonable rate making classifications) in earlier dockets finding that tariffs offered in response to heightened competitive pressures need not be offered throughout a company's service territory. On January 23, 2002 Citizens filed its "Win-Back" Promotion in Docket No. 02-00088. Through that promotion Citizens offered a twenty dollar credit to existing customers who referred existing competitive local exchange company customers to Citizens so long as the newly-referred customer retained basic local residential service for one month. Together with certain term requirements, the "win-back" tariff offered a fifty dollar discount per access line, thirty dollars worth of free features, a free caller ID box, and a waiver of installation and activation fees associated with the promotion.<sup>20</sup> This promotion was limited to the McMinnville and Sparta Exchanges.

On January 29, 2002 the Consumer Advocate and Protection Division of the Office of the Attorney General for the State of Tennessee ("Consumer Advocate") filed its *Complaint and Petition to Intervene* in Docket No. 02-00088, citing Tenn. Code Ann. § 65-4-122(a) in support of its allegation that

[i]f the tariff allowing the 'win-back' promotion becomes effective, it would result in unjust discrimination, undue and unreasonable preference and would be unreasonably prejudicial. Citizens should be required to offer the promotion in their other exchanges in Weakley, Putnam and Cumberland counties. By permitting Citizens to limit their promotion by exchange, it would constitute unjust discrimination to the customers in Citizens' other exchanges.

The Consumer Advocate cited Tenn. Code Ann. § 65-4-122(c) in support of its argument that this promotion should have been offered to all of Citizens' Tennessee exchanges, stating

[i]f the customers in the McMinnville and Sparta exchanges receive the residential "win-back" promotion, then Citizens would be giving them an undue or unreasonable preference or advantage over customers in the Weakley, Putnam and Cumberland County exchanges because they would not be able to receive the benefits of the "win-

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<sup>20</sup> See *In re: Petition of Citizens Telecommunications Company of Tennessee for Approval of Their Residential "Win-Back" Promotion in the McMinnville and Sparta Exchanges*, Docket No. 02-00088, Letter from J. Michael Swatts, State Governmental Affairs Director, Citizens Communications, to David Foster, Utility Rate Specialist, Tennessee Regulatory Authority, RE: *CTC-TN Special Residential Win-back Promotion – McMinnville and Sparta*, (January 23, 2002). This promotion was later modified to include new customers in addition to existing competitive local exchange customers. See *Id.*, Letter from J. Michael Swatts, State Governmental Affairs Director, Citizens Communications, to David Foster, Utility Rate Specialist, Tennessee Regulatory Authority, RE: *CTC-TN Special Residential Win-back Promotion – McMinnville and Sparta*, (January 30, 2002).

back” program since Citizens has not extended the waiver to those customers.<sup>21</sup>

The Consumer Advocate’s *Complaint and Petition to Intervene* also referenced Tennessee’s Telecommunications Services Policy found at Tenn. Code Ann. § 65-4-123 in support of its statement that

If the residential “win-back” promotion is limited to the McMinnville and Sparta exchanges it will unreasonably prejudice consumers. Citizens may offer the promotion without being disadvantaged by providing the residential “win-back” promotion to all their customers in all their exchanges.<sup>22</sup>

On April 24, 2002 the Authority issued its *Order Approving Promotional Tariff and Denying Complaint and Petition to Intervene* in Docket No. 02-00088. In that order, the Authority found that

[b]ased upon information on file with the Authority, Citizens is experiencing stiff competition in its McMinnville and Sparta exchanges, while facing minimal competition in its exchanges located in Weakley, Putnam and Cumberland counties. Accordingly, the Authority finds the competitive pressure prevalent in the McMinnville and Sparta exchanges is sufficient justification for limiting the offer to these two exchanges.<sup>23</sup>

The Authority’s finding in Docket No. 02-00088 concerning a tariff with a similar pricing structure to the one described in the instant *Tariff* is instructive in resolving this case. The Authority has also previously found that a competitive response tariff need not be offered throughout a company’s service territory.<sup>24</sup> The Authority’s prior review of claims like those raised in the instant *Complaint* has resulted in the conclusion that promotional offers which are limited in geographic

<sup>21</sup> See *In re: Petition of Citizens Telecommunications Company of Tennessee for Approval of Their Residential “Win-Back” Promotion in the McMinnville and Sparta Exchanges*, Docket No. 02-00088, *Complaint and Petition to Intervene*, p. 2 (January 28, 2002).

<sup>22</sup> See *In re: Petition of Citizens Telecommunications Company of Tennessee for Approval of Their Residential “Win-Back” Promotion in the McMinnville and Sparta Exchanges*, Docket No. 02-00088, *Complaint and Petition to Intervene*, p. 4 (January 28, 2002).

<sup>23</sup> See *In re: Petition of Citizens Telecommunications Company of Tennessee for Approval of Their Residential “Win-Back” Promotion in the McMinnville and Sparta Exchanges*, Docket No. 02-00088, *Order Approving Promotional Tariff and Denying Complaint and Petition to Intervene*, p. 2 (April 24, 2002).

<sup>24</sup> See *In re: BellSouth Telecommunications, Inc. Tariff to Introduce the Welcome Back! Win Back Program*, Docket No. 00-00391, *Order Approving Initial Order of Hearing Officer Accepting Settlement Agreement and Approving Revised Tariff*, (October 2, 2000) which approved the “Welcome Back! Win Back” promotion filed by BellSouth Telecommunications, Inc. and which limited its promotional offerings to service areas that were experiencing heightened competition. Citizens has also pointed to two tariffs filed in TRA Docket Nos. 00-00963 and 00-00965 which offered lower rates or waived certain charges for customers exclusively in the McMinnville and Sparta exchanges. These two tariffs went into effect unchallenged. See *Motion to Dismiss*, p. 3 (December 4, 2002). Ben Lomand contends that these tariffs are not relevant to its allegations of anti-competitive practices. See *Response to Motion to Dismiss*, pp. 2-3 (December 19, 2002).

scope, e.g., to the Sparta and McMinnville exchanges, do not, by that limitation alone, result in unjust price discrimination, undue or unreasonable preferences, unreasonable prejudice, or unjust or unreasonable ratemaking classifications.

With regard to Ben Lomand's claim that the *Tariff* is a special contract, the Authority finds that this claim has no basis in Tennessee law or under Authority Rules. The promotions offered in the *Tariff* are generally available to qualifying persons. Therefore, this claim is without merit and is dismissed.

The Authority finds that Ben Lomand's allegations regarding anti-competitive behavior and predatory pricing in violation of Tenn. Code Ann. § 65-5-208(c) can not be resolved by reliance on previous Authority findings and orders and that these allegations should be addressed in a contested case. Upon convening a contested case, the Authority established a procedural schedule wherein discovery requests and responses would be filed by January 31, 2003 and February 17, 2003, respectively and direct and rebuttal testimony would be filed by February 26, 2003 and March 5, 2003, respectively.

Upon joint request by Ben Lomand and Citizens, the voting panel also considered this matter at a regularly scheduled Authority Conference on March 3, 2003 for the purpose of appointing a Pre-Hearing Officer. At that time the panel voted unanimously to appoint General Counsel or his designee as Pre-Hearing Officer in this proceeding to hear preliminary matters prior to the Hearing, to rule on any petition(s) for intervention, and to set a procedural schedule to completion.

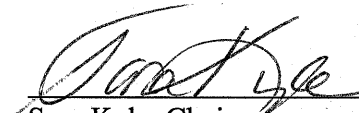
**IT IS THEREFORE ORDERED THAT:**

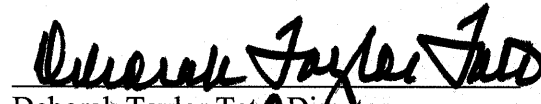
1. A contested case proceeding is convened.
2. The allegations of the *Complaint* of Ben Lomand Communications, Inc. pertaining to anti-competitive behavior and predatory pricing in violation of Tenn. Code Ann. § 65-5-208(c) shall be considered in the contested case. All other allegations contained in the *Complaint* are dismissed.

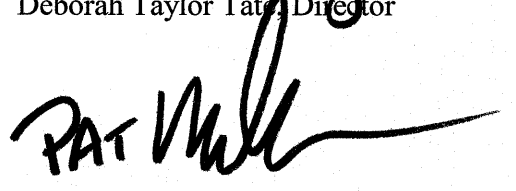


3. *Citizens Telecommunications Company of Tennessee's Motion to Dismiss the Complaint* is denied in part and granted in part. The motion is denied to the extent that the allegations pertaining to anti-competitive behavior and predatory pricing in violation of Tenn. Code Ann. § 65-5-208(c) shall not be dismissed. The motion is granted to the extent that all other allegations contained in the *Complaint* are dismissed.

4. The General Counsel or his designee is appointed Pre-Hearing Officer in this matter to hear preliminary matters prior to the Hearing, to rule on any petition(s) for intervention, and to set a procedural schedule to completion.

  
Sara Kyle, Chairman

  
Deborah Taylor Tate, Director

  
Pat Miller, Director